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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DANIEL POLLOCK, Defendant and Appellant.	B207293 (Los Angeles County Super. Ct. No. LA051091)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael A. Latin, Judge. Affirmed.

Marilee Marshall & Associates and Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

Daniel Pollock appeals from the judgment entered upon his convictions in a court trial of receiving stolen property (Pen. Code, § 496, subd. (a) count 2)[1] and first degree burglary (§ 459, count 7). Appellant was sentenced to the midterm of four years on the burglary conviction and to a concurrent term of two years on the receiving stolen property conviction. Appellant contends that the trial court abused its discretion by (1) finding that appellant's case was not "unusual" within the meaning of section 1203, subdivision (e)(4), thereby precluding probation, and, (2) alternatively, failing to impose the low term on both counts.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND[2]

At approximately 4:15 a.m., on June 6, 2004, Jacqueline Morgan awoke to find appellant inside her apartment. She chased him away and then noticed that personal items of hers were missing. She had not given permission for appellant to be in her apartment or to take her things.

At approximately 7:30 a.m., on September 19, 2005, Temple Poteat awoke and noticed that a number of personal items were missing. Appellant's fingerprints were found inside her residence. Poteat had not given appellant permission to be in her apartment or to take her things.

In December 2005, Los Angeles police officers entered appellant's residence to conduct a probation search and saw 100 items on the floor, including items belonging to Morgan and Poteat that they had reported missing.

An information, filed on January 25, 2006, alleged six counts of receiving stolen property. A seventh count for first degree burglary was subsequently added by amendment. The information further alleged that appellant had suffered four prior

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Because this appeal pertains only to sentencing issues, we only briefly state the facts.

convictions within the meaning of section 1203, subdivision (e)(4), making him ineligible for probation.

Twice during the trial court proceedings doubts were declared as to appellant's competence. On the first occasion, after two of the three experts appointed to evaluate his mental condition found him incompetent to stand trial, the trial court ruled him incompetent, suspended the proceedings for a 90-day progress report and sent appellant to Patton State Hospital.

Patton State Hospital subsequently determined that appellant was competent, and the trial proceedings resumed. Then, a second doubt was declared during voir dire. At a competency hearing, one expert found that appellant was impaired but was barely competent to stand trial. He found that appellant had a low I.Q. and cognitive problems arising from developmental delay and substance abuse. A defense expert witness concluded that appellant was incompetent to stand trial due to his intellectual and neuropsychological limitations, finding him to be mildly retarded. Appellant had suffered multiple head traumas during childhood and had a history of seizures. The trial court found that appellant was competent to stand trial despite his low I.Q. and again reinstated the criminal proceedings.

Appellant waived jury in return for a four-year lid on his sentence if convicted. The trial court convicted him of one count of receiving stolen property and one count of burglary. It sentenced him to four years in state prison.

DISCUSSION

Background

At appellant's sentencing hearing, defense counsel urged the court to sentence him to the low term of two years on the residential burglary conviction and eight months on the receiving stolen property conviction, which would approximate the time appellant had already served. Defense counsel submitted letters from people in appellant's family and community, indicating a support network to assist him and a sober living house willing to accept him. Defense counsel pointed out that it had become apparent that appellant had mental health issues.

In spite of the agreement for a maximum sentence of four years, the prosecutor asked for the trial court to sentence appellant to six years because evidence at trial described a second uncharged burglary. The prosecutor pointed to appellant's four prior felony convictions, three prior misdemeanor convictions and probationary status on four separate grants of probation at the time of the offense.

The trial court indicated that it had read and considered the probation report[3] and "seriously consider[ed] whether [it] should find this to be an unusual case," deserving of probation as an exception to the section 1203, subdivision (e)(4) bar to probation. The trial court also noted that appellant had emotional and physical handicaps. It nonetheless did "not find this to be in any way an unusual case, and the court will be sentencing Mr. Pollock to state prison."

In deciding the length of appellant's sentence, the trial court rejected the prosecutor's request for more prison time than agreed to before trial, finding the request inappropriate. It also considered that appellant had emotional and physical handicaps that predisposed him to becoming involved in criminal activity and made it more difficult for him to learn lessons from his prior behavior. It nonetheless concluded that it could not give less than the four-year lid because "it would be at the expense of the victim, and

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3 The probation report reflected the following convictions: (1) an August 2001 conviction of disturbing the peace, for which appellant was sentenced to two days in jail; (2) a July 2002 conviction of resisting arrest, for which appellant was placed on two years' summary probation and given one day in jail; (3) an October 2002 conviction of trespassing, for which appellant was placed on three years' summary probation and given 20 days in jail; (4) a June 2003 conviction of receiving stolen property, for which appellant was placed on three years' summary probation and given 60 days in jail; (5) a January 2004 conviction of assault, for which appellant was placed on three years' formal probation and given 210 days in jail; (6) a January 2004 conviction of burglary, for which appellant was placed on five years' formal probation and 210 days in jail and subsequently tried for a probation violation; (7) a July 2005 burglary, for which appellant was placed on three years' formal probation and 365 days in jail; and (8) a November 2005 conviction of robbery for which appellant was placed on two years formal probation and given 180 days in jail, and, at the time of the probation report, trial for a probation violation was pending.

there have been too many and the prospect of their being others in the future is too great, and it's just not fair for me to jeopardize the safety and security of those victims and possible future victims by giving him another break." The trial court therefore sentenced appellant to the midterm of four years on the burglary conviction and two years concurrent on the receiving stolen property conviction.

Contentions

Appellant contends that the trial court abused its discretion (1) in failing to find this to be an "unusual case" within the meaning of section 1203, subdivision (e)(4) and to grant probation or, (2) alternatively, in refusing to sentence him to the low term. He argues that the trial court overemphasized his criminal record. We find these contentions to be without merit.

Denial of Probation

Section 1203, subdivision (e)(4) provides: "Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any of the following persons: . . . [¶] . . . [¶] Any person who has been previously convicted twice in this state of a felony . . . ." As appellant had more than two prior felony convictions in California, he was subject to the statutory presumption that probation was inapplicable, and had the burden of establishing that he comes within the narrowly construed exception for "unusual cases." (See *People v. Superior Court* (*Dorsey*) (1996) 50 Cal.App.4th 1216, 1229.)

California Rules of Court, rule 4.413 provides guidance as to factors that may indicate an "unusual case." Those factors fall into two general categories: (1) factors related to the basis for limiting probation, here multiple prior felonies, and (2) factors limiting the defendant's culpability. (Cal. Rules of Court, rule 4.413(c)(1) & (2).)

The first category includes factors demonstrating that the basis for the statutory limitation on probation, although technically present, is not fully applicable. These include (1) that the circumstances giving rise to the limitation on probation are substantially less serious than the circumstances typically present, and the defendant has no recent record of committing similar crimes or crimes of violence, and (2) the

current offense is less serious than a prior felony conviction that is the cause of the limitation on probation, and the defendant has been free from incarceration and serious violation of the law for a substantial time before the current offense. (Cal. Rules of Court, rule 4.413(c)(1)(A) & (B).)

None of these factors are present here. Appellant has more than two prior felony convictions. His crimes have been persistent since 2001 and are of increasing seriousness, including a recent robbery conviction. His most recent prior offense was in 2005, and, since 2001, there has been no significant period when appellant was free of criminal behavior. His current crimes are at least as serious as those in the past. He entered homes in which residents were sleeping in the middle of the night, creating a serious risk of a dangerous or deadly confrontation.

Factors in the second general category include circumstances not amounting to a defense, but reducing the defendant's culpability for the offense. These include that (1) Appellant participated in the crime under circumstances of great provocation, coercion, or duress not amounting to a defense, and the defendant has no recent record of committing crimes of violence, (2) the crime was committed because of a mental condition not amounting to a defense, and there is a high likelihood that the defendant would respond favorably to mental health care and treatment that would be required as a condition of probation, and (3) the defendant is youthful or aged and has no significant record of prior criminal offenses. (Cal. Rules of Court, rule 4.413(c)(2)(A)–(C).)

The only factor arguably applicable to appellant is the second. But the mental health experts who evaluated him were not in agreement as to whether, and to what extent, appellant had any mental conditions. Furthermore, there is nothing in the record to support a conclusion that any of his offenses were the result of a mental condition. The mental health experts testified as to whether appellant's mental condition precluded him from being able to stand trial at the time of their evaluations, not whether the charged offenses, or any of his prior offenses, were the result of any mental

condition. Finally, even assuming that an affirmative finding with respect to the mental health factor was appropriate, that did not preclude the trial court from weighing that factor, and the extent of the mental impairment, against all of the other factors in deciding if this was an "unusual case."

The trial court did not abuse its discretion in concluding that this matter was not an "unusual case" under section 1203, subdivision (e)(4). It therefore did not have to reach the question of whether it should exercise its discretion to grant probation.

Appellant argues that his "unique mental situation was unusual" and that the trial "court should have entertained a more in depth examination of the facts of appellant's life history and mental health problems, given all the information in the record about appellant's diminished mental condition." This argument assumes that the trial court did not conduct an in depth examination, an assumption not supported by the record. The trial court stated that it reviewed the probation report and was aware of appellant's mental issues and gave serious consideration to finding this matter to be an "unusual case." In the face of a record which does not affirmatively indicate that the trial court failed to consider all of the appropriate factors, we presume that it considered all relevant criteria (*People v. Superior Court* (*Du*) (1992) 5 Cal.App.4th 822, 836) and knew and applied the correct statutory and case law (*People v. Jacobo* (1991) 230 Cal.App.3d 1416, 1430).

Middle-term Sentence

Section 1170, subdivision (b) provides: "(b) When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . . In determining the appropriate term, the court may consider the record in the case, the probation officer's report, other reports including reports received pursuant to Section 1203.03 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall select the term which, in the court's discretion, best serves the interests of justice. . . ." The sentencing decision under section 1170, subdivision (b) is subject to review for abuse of discretion. (*People v.*

Sandoval (2007) 41 Cal.4th 825, 847.) Section 461 provides three sentencing alternatives for a first degree burglary of two, four or six years.

California Rules of Court, rule 4.421 sets forth factors in aggravation that the trial court can consider to determine the appropriate sentencing alternative. Numerous factors in aggravation are present in this case. The trial court pointed to appellant's lengthy prior record of convictions of increasing seriousness (Cal. Rules of Court, rule 4.421(b)(2)). It could have subjected appellant to a consecutive sentence on count 2, but instead ordered that sentence concurrent, another aggravating factor. (Cal. Rules of Court, rule 4.421(a)(7).) The prosecutor pointed out to the trial court that the charged offenses occurred while appellant was on probation, a third aggravating factor. (Cal. Rules of Court, rule 4.421(b)(4).) Moreover, the trial court explained that it considered appellant's mental condition but was concerned for the safety of the possible future victims. These factors justified imposing the four-year term.

DISPOSITION

The judgment is affirmed.

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_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST